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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 653

W. DALTON LARUE, SR.

and

JUANITA S. LARUE, *Petitioners*

v.

STEWART L. UDALL,
individually and as Secretary of the Interior,

and

NORTH AMERICAN AVIATION, INC., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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v.

STEWART L. UDALL,
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NORTH AMERICAN AVIATION, INC., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled case on October 3, 1963.

OPINIONS BELOW

The opinion of the Secretary of Interior is reported in 69 I.D. 120 and appears at pages 21-32 of the Joint Appendix prepared for the use of the Court of Appeals and filed here

pursuant to Rule 21(4). The earlier opinions of the District Manager, Reno Land Office, and the Associate Director, Bureau of Land Management are unreported and appear in the Joint Appendix at pages 52-58 and 58-66, respectively. The District Court wrote no opinion; the judgment of the District Court is unreported and appears in the Joint Appendix at page 239. The opinion of the Court of Appeals is unreported and appears in Appendix B hereto, *infra*, page 20a *et seq.*

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on October 3, 1963. The jurisdiction of this court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Does the Secretary of Interior possess statutory authority to dispose of public grazing lands under the Taylor Grazing Act of 1934, through the medium of a Section 8(b) private land exchange, to private parties (a) for private industrial purposes, or (b) for national defense purposes, and thereby terminate a grazing license and destroy a ranching operation?

2. Does Section 9 of the Taylor Grazing Act or the due process protections of the Fifth Amendment require that a grazing licensee be given a full hearing, the protections afforded by the Administrative Procedure Act, and access to the administrative record before the Secretary of Interior may terminate his license in the process of consummating a private land exchange pursuant to Section 8(b) of that Act?

3. Does Section 3 of the Taylor Grazing Act prohibit the Secretary of Interior from terminating a grazing license when such action will impair the value of a licensee's grazing unit when it is pledged as security for bona fide loans?

STATUTES AND REGULATIONS INVOLVED

The statutory provisions involved are the various provisions of the Taylor Grazing Act, 48 Stat. 1269, as amended, 43 U.S.C. Sec. 315, *et seq.* and related land laws. Their pertinent text is set forth in Appendix A, *infra.*

STATEMENT

Since October 1953, petitioners have been owners and operators of a cattle ranch located on public and private land about 30 miles north of Reno within the boundaries of Carson City Grazing District No. 3, Nevada. Petitioners own, in fee some 1,600 acres in five non-contiguous tracts. This "base property" entitles them, under the Taylor Grazing Act and its implementing regulations, to graze on some 10,000 acres of surrounding public domain. Petitioners' grazing rights are embodied in Class 1 annual licenses which the Bureau of Land Management, Department of Interior (hereinafter "BLM") have regularly issued to petitioners and their predecessors. Petitioners' fee holdings, ranching personalty and their range rights are mortgaged as security for outstanding loans.

Due to the railroad grants of the nineteenth century, the land ownership pattern in the area of petitioners' ranch is a checkerboard with land sections alternating in public and private ownership.

In 1958, North American Aviation, Inc. acquired the bulk of the privately owned land in the general vicinity of petitioners' ranch. In order to obtain a cohesive tract to conduct industrial activities of a national defense nature, North America has undertaken to acquire the alternate sections of publicly owned land in the area. The device chosen by North American to obtain this public domain is the private land exchange authorized by Section 8(b) of the Taylor Grazing Act. That provision permits private parties to obtain public land through the exchange of private land of at least "equal value" when "public interests will be benefited thereby."

In July 1958 North American filed private exchange application Nevada No. 048847 to acquire 21 sections of public

land (10,800 acres) located in the heart of the grazing range on which petitioners conduct their ranching activities (the selected lands). In exchange it offered the Government certain barren and unimproved desert lands (the offered lands), located some 100 miles distant in an area where there is no significant grazing activity.

The public lands to which North American seeks title constitute the bulk of the public domain upon which petitioners graze their cattle. These are valuable grazing lands upon which petitioners have made substantial improvements. If the exchange is consummated, petitioners will suffer immediate and irreparable damage: their grazing license and rights will be terminated by the Secretary of the Interior without compensation; their existing ranching operations will be destroyed; the value of the security underlying their outstanding loans will be seriously impaired.

Petitoners' separated fee lands, which would be almost completely surrounded by North American's holdings, are wholly inadequate to support their ranching operation; the little remaining public land in the area would be both inaccessible and insufficient. North American has denied petitioner access to its own lands by entering into an agreement with the Steads, neighboring ranchers to the south, under which it obtained a 40 year first refusal on the Stead ranch and obligated itself to exclude petitioners from grazing on any land which North American owns or may acquire, and from all public land contiguous thereto.[1] By this agreement,

[1] "3. North American shall, to the extent that it has the legal right to do so, exclude from grazing any person, firm, corporation or other business entity, including North American, except William M. Stead, upon the land which North American now or hereafter may own in fee simple within the following boundaries: East of Nevada State Highway 33, South of the Pyramid Indian Reservation, North of Township 20 North, and West of Range 23 East, M.D.B. & M. North American further reserves the right to exclude said William M. Stead from grazing upon all or any part of the above described land of North American, provided that if William

wholly ignored by respondent Udall, the Steads are enabled to graze exclusively on lands respecting which petitioners now possess statutory preferred grazing rights.

Petitioners protested the proposed exchange when they learned of it. On January 26, 1961, the District Manager of the Reno BLM office approved North American's application in part because "the Taylor Grazing Act is a multiple purpose Act, of which measures pertaining to grazing privileges represent only part of the Act's many provisions. Of its many provisions Section 7 of the Taylor Grazing Act clearly provides for disposal of public lands which are valuable or suitable for a higher use than for grazing." (JA 52). On appeal, the Associate Director, BLM upheld the exchange but found that it could be sanctioned only if the public interest in conservation and range management would be benefited.[2]

M. Stead is so excluded, North American shall erect or install adequate fencing between the property and the above described land of North American, or the portion thereof from which William M. Stead is excluded. *North American shall exercise all reasonable efforts to exclude from grazing upon Government land contiguous to the above described North American land everyone, except William M. Stead*, and reserves the right to exclude William M. Stead subject to the provisions set forth above." (JA 34, italics supplied.)

[2] ". . . the Manager erred in his decisions to the extent he implied or ruled that the proposed use of the selected lands by the exchange proponent, in furtherance of space, of missile programs of the Government, is a persuasive factor in determining whether the proposed exchange is in the public interest and in accord with provisions of the Taylor Grazing Act, as amended, *supra*. Considerations of the public interest in a land exchange under the Taylor Grazing Act involve matters related to conservation of Federal resources, i.e., whether the exchange will facilitate the administration of the public lands, e.g., promote the interests of conservation or range management. *The decisions appealed from* are therefore modified to eliminate any reference to any so-called national defense justification for the exchange, this being extraneous to the issue of the public interest in the exchange." (JA 63.)

On August 14, 1962, respondent Udall, as Secretary of the Interior, issued Opinion No. A-29309 upholding the exchange on final appeal. However, he rejected the view of the Associate Director, BLM that the statutory "public interests" criterion related to considerations of conservation and range management; he affirmed the interpretation of the Reno BLM office that the statute authorizes private exchanges which confer national defense and general economic benefits.[3]

At all stages of the administrative process, petitioners made timely demands for a hearing which were denied. They were refused the opportunity to conduct cross-examination on materials in the administrative file. They were denied access to materials contained in the file upon which respondent Udall based his action, a procedure which is a direct violation of governing regulations (43 CFR 146.8(c) and 43 CFR 221.99(d)).

On August 31, 1962, petitioners filed suit in the United States District Court for the District of Columbia, seeking to enjoin respondent Udall from consummating Nevada exchange No. 048847 and from issuing a patent to North American for the public lands involved. This suit invoked the general equity jurisdiction of the District Court on the grounds that respondent Udall's past and threatened actions in the circumstances of this case were without basis in and beyond the scope of his statutory authority and were unconstitutional. (JA 3, *et seq.*)

The case was tried upon cross-motions for summary judgment. On March 6, 1962, the Court, without opinion, granted respondent Udall's motion for summary judgment and dis-

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[3] "I am of the opinion that the benefit to the public interests, which is the criterion of the statute, need not be related exclusively to conservation of Federal grazing resources nor need it be shown that a proposed exchange will promote range management. In my opinion the construction placed on section 8(b) by the manager of the Reno land office is the proper one." (JA 27.)

missed the complaint. Thereupon a timely appeal was taken to the United States Court of Appeals for the District of Columbia Circuit. On October 3, 1963, a panel of the court affirmed the action of the District Court upon a finding that the "public interests" criterion of Section 8(b) of the Taylor Grazing Act is not "limited or restricted in any way." (p. 24a) In a concurring opinion, Chief Judge Bazelon sharply disagreed; he found that the statute authorized only those disposals of public domain which benefit public grazing interests (p. 28a, 30a).

REASONS FOR GRANTING THE WRIT

Introduction

The decision below raises important and basic questions involving the statutory construction and administration of the Taylor Grazing Act. At issue, in the first instance, is the authority of the Secretary of Interior to abrogate statutory grazing rights and destroy a productive ranching operation, and to assert a plenary power to dispose of the public domain for private, industrial uses—all predicated upon a tortured reading of a conservation statute designed to safeguard ranchers. Such action, moreover, by-passes statutory provisions designed to protect the value of petitioners' grazing unit as loan collateral and to provide just compensation when petitioners' grazing rights are to be sacrificed for national defense projects.

As recently as the current session of Congress, respondent Udall has continued his campaign to obtain at least limited *legislative* authority to dispose of public land to private parties for business or industrial uses. The Congress thus far has failed or refused to act. Without waiting for a new grant or redefinition of statutory authority, respondent Udall now has undertaken unilaterally to assert unfettered disposal authority.

Equally important, the administrative action here challenged presents serious statutory and constitutional prob-

lems as to the right of a hearing and access to the administrative record upon which the Secretary of Interior acts. Unless this Court intervenes, ranchers will be deprived of their statutory grazing rights, and their ranching operations and livelihoods will be destroyed, without a hearing and the opportunity to know, scrutinize and cross-examine the material upon which such a decision is based. Private exchange applications, because of the multitude of factual questions presented, urgently require the safeguard of hearings. The Secretary's decision in this case is replete with error both in the factual conclusions reached and in the matters ignored; only a hearing, as required both by the statute and due process, can adequately safeguard petitioners from such erroneous and unfair administrative action.

Agency action on other North American applications and, we believe, other similar private exchanges, are being held in abeyance pending determination of this test case. It is not consistent with the sound administration of justice to defer determination of these recurring and fundamental questions; delay will permit the continued total and uncompensated destruction in the interim of ranching operations.

1. Section 8(b) of the Taylor Grazing Act authorizes the Secretary of the Interior to convey public lands to private parties in exchange for lands of at least equal value when "public interests will be benefited thereby." The critical issue raised by this case is whether Congress in enacting this provision gave the Secretary of Interior virtually unfettered discretionary authority to make wholesale dispositions of the public domain to private parties for private purposes, particularly when such action is in derogation of the purposes of the statute and rights granted thereunder.

Respondent Udall contends that the term "public interest" has no fixed meaning, that potentially it embraces every pos-

sible public interest and that the statutory criterion may be enlarged from time to time to accommodate changing times, conditions and interests. The corollary assertion is made that this authority to dispose of the public domain to private parties is co-extensive with the plenary power which the Constitution gives the Congress to dispose of the public lands (Article IV, Section 3, Clause 2). The Court of Appeals agrees with the latter view. It finds that the "public interests" criterion is not "limited or restricted in any way." (p. 23a). Chief Judge Bazelon wholly disagrees; he finds that the Secretary's disposal power is limited to exchanges which benefit "public grazing interests" consistent with the grazing and range stabilization policies of the Act (p. 28a, 30a).

The decision below ignores the basic axiom that a statutory term takes on color from its context and meaning from the purposes, policies and standards of the statute involved. This is necessary not only to effectuate the legislative will but also to avoid the risk of unconstitutional delegation of statutory power. *New York Central Securities Corp.* v. *U.S.*, 287 U.S. 12, 24-25 (1932).

The Taylor Grazing Act is a conservation measure designed to promote the orderly use of the public range as a national resource and food supply and to define the grazing rights of stockmen and protect such rights against interference (Sec. 2; 43 CFR 161.1(a)); *Red Cannon Sheep Co.* v. *Ickes*, 98 F.2d 308 (D.C.Cir., 1938); *McNeil* v. *Seaton*, 281 F.2d 931 (D.C.Cir., 1960). Both the Senate and House Report stated: "*It should be understood that the whole purpose of the Bill is to conserve the public range in aid of the livestock industry. The Bill makes no disposition of the public domain which comes within its scope but merely provides for the more orderly use of their grazing resources.*"[4]

The disposal power of Section 8(b) is circumscribed by the purposes, policies and standards of the statute. The

[4] H.R.Rep. No. 903 on H.R. 6462, 73rd Cong. 2d Sess. (1934), p. 2; S.Rep. No. 1182 on H.R. 6462, 73rd Cong. 2d Sess. (1934), p. 2.

exchange provision was intended to facilitate effective range management by permitting both the Government and ranchers to consolidate grazing areas for their mutual benefit.[5]

Only a few months after the passage of the statute, Solicitor Nathan Margold, in an opinion approved by Assistant Secretary Oscar Chapman, held that Section 8 authorized such exchanges as "*will benefit the public interests which are enunciated in the Taylor Grazing Act and are served thereby. It cannot be doubted that Congress therein authorized only those exchanges which will benefit the public interests in regulation of grazing on the public range under the Taylor Act. Exchanges other than these would be without legal authority.*" *Land Exchange with States Under Taylor Grazing Act*, 55 I.D. 9 (1934).[6]

Petitioners are issued grazing licenses in view of their entitlement under the Act and implementing regulations as members of a preferred class (Act, Sec. 3) with certain priority rights derived from their ownership of "base lands" which are "dependent by use."[7] The purpose of the Act was to define and confer grazing rights; these rights may not be lawfully evaded by third parties including the Secretary of Interior and his subordinates. *Oman* v. *United States*, 179 F.2d 738 (10th Cir., 1949); *Hatahley* v. *United States*, 351 U.S. 173 (1956). Indeed the Secretary has "an affirmative obligation to absolutely safeguard" these rights granted by statute. *McNeil* v. *Seaton*, *supra*, 281 F.2d at 934. Moreover, Congress expressly gave ranchers who like petitioners

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[5] *Reports, ibid.*, p. 3; 78 Cong. Rec. 6359 (1934); Hearings on H.R. 6462 Before the Senate Committee on Public Lands and Surveys; 73rd Cong. 2d Sess. 16-17, 94-100 (1934); Hearings Before a Subcommittee on the Senate Committee on Public Lands and Surveys, 76th Cong. (1941-45), pp. 6, 905.

[6] The text of Section 8 as originally enacted appears *infra* p. 16a-17a.

[7] 43 CFR 161.1(b); 161.6(b)(1)(i); 161.4(b); 161.2(k)(1); 161.2(k)(2); 161.2(h).

had pledged their grazing units, a vested right to continue to graze which the Secretary himself could not terminate. (Act, Sec. 3, see *infra*, pp. 19-21).

The Court of Appeals has now found that grazing rights may be terminated without compensation and that ranching operations may be totally destroyed for considerations wholly divorced from the purposes of the Taylor Grazing Act to promote conservation and sound range management. Congress could hardly have intended to authorize such action when it enacted a statute which defined and bestowed grazing rights upon qualified ranchers.

Respondent Udall's claim of plenary disposal authority is totally inconsistent with the historic Congressional policy of jealously guarding its constitutional authority to dispose of the public domain. It has forbidden general alienation of public land (43 U.S.C. 671, *infra*, p. 17a) and has limited disposition to a handful of special purpose statutes, none of which authorizes the sale of more than 1,520 acres in a single transaction. As regards disposals to private parties for industrial and commercial purposes, Congress has sanctioned only the sale of small tracts of less than 5 acres, a provision manifestly not applicable here. (43 U.S.C. 682a, *infra*, p. 17a).

Nor is the Congressional policy different with respect to dispositions in aid of the national defense. While Congress permits withdrawals of the public domain for National Defense uses by Governmental agencies and provides for their lease to private contractors,* it maintains a tight rein over such activity. Congress has required that its specific leave be obtained whenever the public land sought to be withdrawn for national defense uses in more than 5,000 acres. (43 U.S.C. 156, *infra*, p. 19a). Moreover, "fair and reasonable" compensation must be paid to ranchers for their lost grazing rights in all cases of national defense with-

* 10 U.S.C. 2667.

drawals (43 U.S.C. 315q, *infra*, p. 18a). Through the device of a section 8(b) exchange, North American here seeks to receive in fee public land which the Department of Defense itself could not use without prior and specific Congressional authorization, and only then upon the payment of appropriate compensation to petitioners for the cancellation of their grazing licenses.

Congress has thus far refused to grant the Secretary even a fraction of the disposal authority which the Court of Appeals now finds he possesses under the Taylor Grazing Act. His repeated requests for legislation to permit dispositions to such private interests as the electronic, aircraft and missile industries have yet to receive favorable action—even though his own proposals were severely limited in extent and qualified by standards and provisions designed to protect ranchers.[9] By his own admission the Secretary, in

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[9] The obsolescence of the public land laws and the need to provide for disposal, with safeguards, of portions of the public domain for industrial and commercial uses continue to be the subject of intense and widespread Congressional concern and activity.

In the current session of the 88th Congress alone, a multitude of proposals are already the subject of consideration. Bills have been introduced and hearings held regarding the conduct of a comprehensive study and review of all public land laws and of the Taylor Grazing Act in particular (H.R. 8070, H.R. 8071, H.R. 8072, H.R. 8073, H.J. Res. 52; Hearings Before the Subcommittee on Public Lands of the House Committee on Interior and Insular Affairs, *Public Lands Review*, Ser. # 11, Part II-*Public Land Law Review Commission* (1963); Hearings Before the Subcommittee on Public Lands of the Senate Committee on Interior and Insular Affairs, *Review of the Taylor Grazing Act*, Parts 1, 2 and 3 (1963).

The Interior Department continues to press for legislation authorizing disposals to private parties for non-conservation uses. Of the numerous bills now pending, the Department particularly favors the amendment of Section 14 of the Taylor Grazing Act (S. 1600, H.R. 5498). Other measures of importance would provide for a more comprehensive framework for urban, industrial and commercial dispositions (S. 1599, S. 1601, H.R. 255). These bills

the absence of express statutory authority, is seeking to use the private exchange provisions as a "roundabout" method of effecting such dispositions.[10] It may well be that existing land laws are antiquated in light of changing circumstances but it is for Congress, not the Secretary, to amend existing law.

This fundamental issue of the Secretary's authority is not only of widespread importance to the nation's ranchers, but its resolution here is of critical significance for peti-

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place a limitation on such dispositions which range from 640 to 5,000 acres. Most contain standards which require that disposals be considered in light of their effect on the conservation of natural resources and upon the welfare of the individuals involved. (See in particular, *The Public Lands, Background Information on the Operation of the Present Public Land Laws*, prepared by the Subcommittee on Public Lands for the Senate Committee on Interior and Insular Affairs (Aug. 22, 1963); Hearings, House Subcommittee on Public Lands, *Public Lands Review, supra*, serial # 11, Part I—*Use and Disposal of Public Lands.*

Other pending legislation would provide for the amendment of Section 8 of the Taylor Grazing Act (S. 1598, H.R. 5862, Hearings, Subcommittee on Public Lands of the Senate Committee On Interior and Insular Affairs, *Public Land Review*, Part 2 (1963). Bills also have been introduced to provide for the management of the public lands under the principles of multiple use. (H.R. 5159, S. 601 Amendment, S. 1602, House Hearings, *Public Lands Review*, Part 1, *supra.*)

Such efforts to obtain Congressional authorization for urban, industrial and commercial dispositions have been undertaken by the Department, without success, in earlier sessions. Comprehensive bills to this effect were introduced in both the 86th and 87th Congresses (H.R. 7042, S. 1905-86th Cong.; H.R. 7788, H.R. 7789, H.R. 1992, H.R. 5277, H.R. 10454, S. 2219—87th Cong., Hearings Before the Subcommittee on Public Lands of the House Committee on Interior and Insular Affairs, "*Classification and Sale of Non-mineral-Nonagricultural Public Lands*, ser. # 17, 87th Congress.

[10] Interior Department, *Annual Report*, 1961, p. 32-4; Letter of July 14, 1961 to Speaker Rayburn from Assistant Secretary Carver, Hearings before the Subcommittee on Public Lands of the House Committee on Interior and Insular Affairs. Ser. 17, 87th Congress, *supra*, *fn.* 9, p. 6.

tioners. The Court of Appeals erred in sustaining respondent Udall's action because of its apparent belief that the Secretary had made a finding that North American's exchange would benefit grazing interests and that this constituted a wholly sufficient independent basis of his decision. This was Judge Bazelon's view; the position of the majority is less clear.

A reading of the Secretary's opinion can leave no doubt that the exchange was approved because of the national defense and economic benefits which, it was anticipated, would flow from North American's industrial activities. That rationale thoroughly permeates and is a fundamental basis of the challenged decision. We have no way of knowing how the Secretary would have decided this case if he had known that the principal basis of his decision would be found unlawful.

Respondent Udall's action can only be judged on the basis upon which he has chosen to act. A judicial determination cannot be made to do service for an administrative judgment. *Securities Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 87-88, 95 (1943); *Id.* 322 U.S. 194, 196 (1947).

But this is precisely the error into which the Court below falls. In suggesting that the Secretary made an independent finding of grazing benefits, it relies upon random statements which it evidently believes would support such a finding if the Secretary had seen fit to make one. *But the crux of the matter is that the Secretary, in fact, declined to make such an independent finding as the basis of decision.*

The majority merely say that respondent Udall "gave another reason for approving the exchange," when he stated "that acquisition of the offered lands would block out holdings of public lands and would facilitate the administration and management of the area for grazing

purposes."[11] From this the majority feel that the Secretary "seems to have" considered the net impact of the exchange on grazing and range management. (p. 24a). Judge Bazelon thinks that the Secretary's finding of grazing benefit "appears" from two of his statements, including the one relied upon by the majority (p. 28a, footnote 1).[12]

Not only does the majority supply a basis for decision which respondent Udall did not make, but they rely upon a statement which does not even appear in the context of Udall's discussion of the "public interests" which the exchange would benefit. Only *after* making his public interest determination did respondent Udall turn to consider the impact of the exchange on land conservation policies. He did so in ancillary fashion *for the sole purpose of justifying a departure from a then existing policy statement restricting private exchanges.* (JA 31). To raise a few sentences of this ancillary discussion into an independent basis of decision constitutes an improper judicial re-working of an

[11] This statement itself is erroneous. Petitioners requested a hearing, *inter alia*, so that they might effectively demonstrate the following: The offered lands are barren and unproductive desert lands which have sparse forage and almost no water. Because of their steep and rocky topography, they have only a limited potential use as a winter headquarters for sheep. A widespread infestation of the poisonous plant halogeton, however, prevents their use even for this limited purpose. They are unsuited for and cannot now be used for any significant grazing. No federal range demand has ever existed for them. (JA 9-10).

[12] Judge Bazelon also relies on the Secretary's statement that the importance of grazing in the area of the selected lands has lessened in recent years. But the Secretary's observation was based on the belief that North American had taken the fee holdings in the area of the selected lands out of the category of base lands upon which grazing privileges may be issued by refusing to lease its newly acquired land to livestock operators. (JA 30.) In this the Secretary was in error. The fact is that North American has leased these lands to a neighboring rancher (JA 43-45) and the Interior Department has issued a Class I grazing license to it for continued grazing on these very lands. (JA 207.)

administrative determination; it ignores both the essential basis of the action taken and supplies a ground of decision that the Secretary declined to make. Respondent Udall should be given the opportunity to reconsider and restate his views after he is given the benefit of a judicial determination as to the scope of his powers.

2. Petitioners believe that both Section 9 of the Taylor Grazing Act and the due process clause of the Fifth Amendment entitle them to a hearing before their grazing license may be terminated to permit the consummation of a private land exchange. They also contend that they were deprived of due process in being denied access to materials in the administrative file upon which respondent Udall based his action. Such a practice is proscribed by governing regulations (43 CFR 146.8(c) and 43 CFR 221.99(d).[13] In rejecting these contentions, the opinion below raises important questions of statutory construction and of the fundamental fairness of respondent Udall's actions.

Section 9 of the Taylor Grazing Act provides for a hearing whenever an appeal is taken from a determination of a local administrative officer of the Interior Department. The Secretary of Interior has consistently held that this statutory hearing requirement applies to all appeals from initial determinations involving the issuance, denial, reduction, termination and cancellation of grazing permits and licenses. In all such cases of adjudication, an aggrieved party may demand an A.P.A. hearing upon appeal of the decision of the BLM District Manager (*Frank Halls*, 62 I.D. 344 (1955); *E. L. Cord d/b/a El Jiggs Ranch*, 64 I.D. 232 (1957); 43 CFR 161.6(f), 161.9, 161.12(e) and particularly 161.10).

As a necessary step in consummating the North American private land exchange, respondent Udall will act to

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[13] Text of 43 C.F.R. 221.99(d) is as follows:

"In any case, no decision on appeal or in a contest shall be based upon any record, statement file or similar document which is not open to inspection by the parties to the appeal or contest."

terminate petitioners' outstanding grazing license. We submit it is immaterial whether a grazing license is terminated in a proceeding instituted for that purpose or whether termination is an indirect but necessary consequence of implementing the approval of a private exchange application. The action taken and the effect upon the licensee is the same regardless of the type of adjudicatory proceeding involved.[14]

Secondly, due process protections require that a hearing be held before a grazing license is terminated either directly or indirectly.

This Court consistently has held that due process and traditional forms of fair procedures require the granting of a hearing and the opportunity for confrontation and cross-examination before a person can be deprived of his livelihood. This is true even where the Constitution may not inhibit the action, or where Congress has not provided for such procedures. It is particularly the case where a person's work opportunities are seriously limited on the basis of disputed factual determinations rendered in a manner inconsistent with traditional ideas of fair procedure. *Greene* v. *McElroy*, 360 U.S. 474, 507-8 (1959) and cases there cited; *Willner* v. *Committee on Character and Fitness*, 373 U.S. 96 (1963); *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963). Here, petitioners' livelihood, derived in part from statutorily preferred rights, will be wholly destroyed with-

[14] The Court of Appeals seeks to avoid the statutory direction to accord a hearing by a suggestion that in this case there is no local administrative officer "in charge" of private land exchange applications as that term is used in Section 9. But the procedures for adjudicating *applications* for licenses (where Section 9 admittedly requires a hearing) are identical with those for determination of private exchange applications. The statute vests the Secretary of the Interior with the ultimate authority in both cases (Act, Secs. 3, 2 and 8); he in turn has delegated the initial decision in each instance to the Manager of the District Land Office (43 CFR 161.9 and 43 CFR Part 146).

out compensation on the basis of demonstrably erroneous factual determinations which they have been foreclosed from effectively challenging.

Petitioners concede that they possess no such right, title and interest in and to the public domain as would entitle them to just compensation. The due process and just compensation provisions of the Fifth Amendment constitute separate and different safeguards. But the Taylor Grazing Act gives petitioners a right to *use* the public domain for grazing purposes. The courts consistently have held that such grazing rights granted by statute have real value to their possessors; once embodied in licenses they, like more traditional property rights, are the subject of judicial protection against illegal acts. *Red Canyon Sheep Co.* v. *Ickes, supra*, 98 F.2d at 315-16; *McNeil* v. *Seaton, supra*. The majority below wholly ignores these precedents.

Even where the issuance of a license is subject to plenary discretion, ". . . once granted, the license becomes a right and due process of law must be followed to achieve deprivation. This is true even though the license is a severely qualified one, such as a radio license." *In re Carter*, 177 F.2d 75, 78 (D.C.Cir.) *cert. denied*, 338 U.S. 900 (1949). This is particularly the case when the license is the predicate of private investment and the conduct of a business activity. And even if the right granted by a license is limited in time and quality and by its terms is subject to suspension, modification or revocation in the public interest, its impairment, directly or indirectly, constitutes *pro tanto* a deprivation of property. *L. B. Wilson Inc.* v. *FCC*, 170 F.2d 793, 798-802 (D.C.Cir., 1948). See also *Philadelphia Company* v. *SEC*, 175 F.2d 808 (D.C.Cir.), *vacated as moot* 337 U.S. 901 (1949)

Further, the action here challenged will substantially impair the value of petitioners' grazing unit which underlies its outstanding loans. The property rights both of petitioners and lenders in this security will be seriously injured. Moreover, as discussed *infra*, pp. 19-21, Congress in

enacting Section 3 of the Taylor Grazing Act gave express recognition to these various private rights and sought to protect them from administrative invasion. Congress clearly understood that Section 3 gives ranchers a vested right to continue to graze on the public domain when their grazing unit is pledged as security.

An adversary hearing before an independent Examiner with the opportunity of cross-examination is urgently required in view of the numerous factual considerations here at issue, *e.g.*,—the "equal value" of the offered lands as contrasted with the selected lands; the actual use to be made by North American of the selected lands; the alleged incompatibility of North American's use with continued grazing; the contribution of the offered desert lands to a program of range management; the impact of the exchange upon petitioners' ranching operations; the allegedly reduced importance of grazing in the area of the selected lands; the grazing activities which North American has permitted other ranchers to carry on in its fee holdings and which BLM has licensed; the facts surrounding the North American-Stead agreement—wholly ignored by the Secretary—which enables another rancher not so entitled by statute to graze *exclusively* on the selected lands.

Petitioners do not ask this Court to review the evidence underlying the Secretary's factual statements. We merely indicate that numerous factual questions are at issue, and that petitioners' rights can be effectively safeguarded only if they are given access to the administrative file and a hearing with the right of cross-examination.

3. The opinion below raises an important question as to the construction of Section 3 of the Taylor Grazing Act. Petitioners' grazing unit is pledged as security for bona fide loans. Consummation of the North American exchange and termination of petitioners' grazing license will substantially impair the value of this security.

Section 3 of the Act prohibits the Secretary from refusing to renew a grazing license when the value of such security will be impaired. The Secretary can hardly be permitted to by-pass the statutory prohibition and produce the same result by terminating an outstanding license prior to the expiration of its term and the time for renewal. In so acting, he destroys the property rights of both ranchers and lenders in their loan collateral.

Section 3 does constitute a significant limitation upon the Secretary's discretionary power under the statute. But the fact that Section 3 gives ranchers whose units are pledged a vested right to continue grazing was clearly understood and vigorously debated by Congress, both when it enacted the provision [15] and when it subsequently defeated an attempt to revoke this limitation.[16] Moreover, the requirement that the loan be "bona fide" provides the basis for administrative disallowance of fraudulent or abusive arrangements.

The Court of Appeals concluded that extension of a pledge is merely a "factor to be considered" in establishing preference between conflicting applicants for grazing permits. But the governing regulations, in describing the factors to be considered in establishing preference and priority, make no mention of pledges. In 30 years the Secretary has never before treated pledges as a preference factor in adjudicating license applications among competing ranchers. The Court's rationalization is wholly inconsistent with the purpose of the provision to facilitate bank credit by safeguard-

[15] 78 Cong. Rec. 11152-55, 11162, 12004 (1934). See *Hearings*—76th Congress, *supra*, *fn.* 5 at p. 170. (Statement of Senator McCarren.)

[16] See particularly 79 Cong. Rec. 8104, 8107 (1935). A provision to delete Sec. 3 from the Taylor Act, suggested by Secretary Ickes, was inserted by the House in H.R. 3019 after an adverse Committee Report (H.P. Rept. 479, 74th Cong. 1st Sess., p. 9, 79 Cong. Rec. 8103-09). The provision was dropped from the Senate Bill and the final Conference measure. (79 Cong. Rec. 12181, 13769, 14013). The bill itself received a pocket veto.

ing the value as collateral of a grazing unit. The legislative history makes it clear that the Section 3 prohibition is concerned with the pledging of a grazing unit only *after* a selection, on the basis of preference and priority, has been made among competing applicants and grazing rights have been awarded.

4. There is a pressing need now for the court to resolve the issues in dispute. Important recurring questions of statutory construction and administration and constitutional right, basic to ranchers throughout the country, are raised. The decision below is erroneous and hurtful. This is a test case and not a unique case. Administration action on other North American applications and, we believe, other private exchanges, are being held in abeyance pending the outcome here. To defer determination of the issues presented by this case would permit the total and uncompensated destruction in the interm of ranching operations and men's livelihoods.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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